No. 84-9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY and CECILIA STEVENSON,

Petitioners,

v.

DORIS RUSSELL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

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August 17, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

9pp

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In urging this Court to issue a writ of certiorari, petitioners demonstrated both the extensive confusion existing in the lower courts over whether ERISA permits awards of punitive or extra-contractual damages against fiduciaries in the benefit claims context as well as the extraordinary importance this question holds for the proper administration of employee benefit plans. In her response, respondent concedes the validity of these contentions and, indeed, joins petitioners in urging this Court to review the Ninth Circuit's judgment. While respondent goes on to maintain that the Ninth Circuit's decision should be affirmed, the arguments which she marshals in support of this position not only highlight the need for urgent clarification of the issues raised by the petition,

but also offer compelling grounds for overturning the Ninth Circuit's judgment.

1. Throughout her response, respondent endeavors to portray the facts underlying this case as something more than a "simple and routine" dispute over employee benefits. Yet, any reasonable reading of the record demonstrates the decidedly common nature of the factual events. The respondent, Mrs. Russell, initially began receiving short-term disability benefits based on her representation that she was suffering from a back ailment. Three months later, when Russell's disability had failed to abate, Mass Mutual's Disability Committee, acting as prudent fiduciaries, sought independent verification of her illness. When the resulting examination report indicated that Russell was not disabled, her benefits were discontinued. Russell then invoked the plan's claims appeal procedure and brought additional information before the Committee. Based upon this new data, as well as an independent psychiatric examination, her benefits ultimately were restored retroactively to the date of their discontinuance.

Notwithstanding respondent's contentions, it is difficult to imagine a more archetypical benefit claims case or a more classic example of the orderly internal resolution of a benefit claims dispute. Indeed, the only thing atypical is the fact that the parties are still embroiled in litigation more than four years *after* respondent's benefits were restored in full. As demonstrated in the petition, such a result can only undermine the internal dispute resolution process which Congress mandated as essential to ERISA. *See* ERISA § 503, 29 U.S.C. § 1133 (1982). As with any administrative process, this claims review procedure is designed to foster an informal exchange of information, with the goal of allowing benefit plans to correct any inadvertent or misinformed decisions in the first instance, thereby permitting both the participant and the plan to avoid unnecessary and costly litigation. *See,*

e.g., Kross v. Western Electric Co., 701 F.2d 1238, 1244-45 (7th Cir. 1983); *Amato v. Bernard*, 618 F.2d 559, 567-68 (9th Cir. 1980); *Lucas v. Warner & Swasey Co.*, 475 F. Supp. 1071, 1074 (E.D. Pa. 1979); *Taylor v. Bakery & Confectionary Union & Industry International Welfare Fund*, 455 F. Supp. 816, 819-20 (E.D.N.C. 1978). If litigation, including claims for punitive relief, nonetheless may be predicated on initial decisions which are later corrected, then the objectives served by this internal review will be largely negated, a contention that respondent fails even to address in her response.

2. Despite her efforts to support the decision below, respondent can point to *no* provision in ERISA which authorizes an award of punitive or extra-contractual compensatory relief against individual fiduciaries, arising from a dispute over benefits. Indeed, respondent mentions Section 409—the statutory basis for damages relied upon by the Ninth Circuit—only once in passing and then seizes upon the phrase "equitable or remedial relief" as grounds for allowing punitive damages, notwithstanding that such relief has never been viewed as either remedial or equitable in nature.[1] Moreover, respondent totally ignores the fact that both the remaining language of Section 409 and its legislative history make clear that Section 409 authorizes recovery solely on behalf of the plan itself, and not individual participants.

Nor does the legislative history of ERISA otherwise suggest that punitive damages against fiduciaries might be appropriate.[2] As this Court has stated time and time again, without some express manifestation of

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[1] Indeed, respondent admits that making punitive damages available against fiduciaries would serve only a "deterrent purpose," and not an equitable or remedial function. *See* Response to Petition at 35.

[2] Respondent relies upon statements in the legislative history that Congress intended "to provide the full range of legal and equitable remedies available in both state and federal courts" to remedy breaches of fiduciary duty. *See* Response to Petition at 22.

intent on the part of Congress, remedies not specifically authorized by statute will not be created. *See, e.g., Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981); *California v. Sierra Club*, 451 U.S. 287 (1981). In particular, "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when [as here] Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement."[3] *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97 (1981).

This language, however, had its genesis in an earlier version of ERISA which provided for "[c]ivil actions for appropriate relief, legal or equitable, to redress or restrain a breach of any responsibility, obligation, or duty of a fiduciary . . . ." *See* H.R. 2, 93d Cong., 2d Sess. (1974), *reprinted in* Legislative History of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 94th Cong., 2d Sess., Vol. III at 3816 (1976). The civil enforcement provisions ultimately passed in ERISA were far more circumscribed, providing participants and beneficiaries with an opportunity to recover only contractual benefits under the plan, and other equitable relief under Section 502(a)(1) and (2), and not individualized damages against a fiduciary.

[3] Indeed, where Congress desired to provide for punitive-type remedies in ERISA, it did so explicitly. Under Section 502(g)(2), Congress provided an award of liquidated damages against employers who fail to make contributions to multiemployer plans, as required by the plan documents. ERISA § 502(g)(2)(C), 29 U.S.C. § 1132(g)(2)(C) (1982). Further, this section specifically confers upon the court discretion to order such other *"legal* or equitable relief" as it deems appropriate. ERISA § 502(g)(2)(E), 29 U.S.C. § 1132(g)(2)(E) (1982) (emphasis added). In addition, where administrators fail to comply in a timely manner with a proper request for information, they may be assessed a statutory penalty under ERISA of up to $100 per day. *See* ERISA §§ 502a)(1)(A), (a)(4), (c), 29 U.S.C. §§ 1132(a)(1)(A), (a)(4), (c) (1982). No such relief is available either in the remaining enforcement provisions of Section 502 governing benefit claims disputes or in Section 409. Thus, Congress must have determined that these harsh remedies were inappropriate for actions arising in the benefit claims context.

3. Respondent also has failed totally to rebut petitioners' demonstration that the lower court's decision will have a severe detrimental impact on the administration of both employee benefit plans and the courts. In particular, respondent's argument that punitive damages will actually be awarded only in limited circumstances and that prudent fiduciaries will have nothing to fear from the availability of such awards misses the mark entirely. As a threshold matter, despite the seemingly stringent standard governing the availability of such relief, punitive damage awards have become commonplace in litigation and often have been assessed in wholly arbitrary and unpredictable amounts. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50 (1979); Brief of Amici Curiae American Council of Life Insurance and Health Insurance Ass'n of America at 13-19; Brief of Amici Curiae Alaska Fishermen's Union-Salmon Canners Pension Trust, et al. at 19-20. Even more importantly, it is not the actual imposition of punitive damages in particular cases that threatens to disrupt the efficient administration of employee benefit claims. Rather, it is the specter of punitive damage awards and the concomitant proliferation of litigation seeking punitive damages which poses the most severe harm.

Nor, as respondent suggests, are these likely consequences "mere speculation." *See* Response to Petition at 40. This Court has long taken judicial notice of the adverse effects accompanying punitive damage awards, including the disruption of responsible decisionmaking, the resulting restraints placed on internal resolution of disputes, *see International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 51-52 (1979), and the encouragement of unnecessary litigation, *see Smith v. Wade*, 103 S.Ct. 1625, 1642 (1983) (Rehnquist, J., dissenting). Moreover, as amici curiae have pointed out, disgruntled participants, taking their cue from the Ninth Circuit, have already begun to file claims for extra-

contractual compensatory damages, such as mental pain and suffering, and punitive damages arising from benefit disputes in federal courts in the Ninth Circuit. *See* Brief of Amici Curiae Pipe Trust, et al., at 8. Thus, this opinion can be sure to inspire a dramatic increase in litigation, which can only impair the financial stability of employee benefit plans while unnecessarily burdening the federal courts.[4]

For the foregoing reasons, as well as the grounds advanced in the petition and by the amici curiae, a writ of certiorari should issue to review the opinion of the Ninth Circuit.

Respectfully submitted,

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[4] Moreover, contrary to respondent's contentions, imposing unpredictable punitive damage awards against fiduciaries is unnecessary to further the policies underlying ERISA. As petitioners have demonstrated, far from being immunized from liability for misconduct, ERISA fiduciaries are subject to a wide range of statutory and regulatory remedies, including personal liability for losses to the plan arising from a breach of fiduciary duty, removal of the fiduciary and imposition of criminal penalties. *See* Petition at 13-14. Further, in circumstances involving gross misconduct, fiduciaries could be compelled to pay the attorneys' fees and costs for prevailing participants or beneficiaries in benefit claims cases. *See* ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1) (1982). These provisions are more than adequate to deter fiduciaries from misconduct in the administration of employee benefit plans, particularly since they are often uncompensated for their services and have no financial stake in the outcome of benefit claims disputes.